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No. 06-987

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In The Supreme Court of the United States

LAWRENCE F. GLASER, and MAUREEN GLASER, individually and on behalf of KIMBERLY, ERIN, HANNAH, and BENJAMIN GLASER,

Petitioners,

versus

ENZO BIOCHEM, INC., HEIMAN GROSS, BARRY WEINER, ELAZAR RABBANI, SHARIM RABBANI, JOHN DELUCCA, DEAN ENGELHARDT, and DOES 1-50,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Respondent Enzo Biochem, Inc. states that it is a publicly held New York Corporation (listed on the New York Stock Exchange), and that there are no parent corporations or publicly held companies owning 10% or more of its stock.

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INTRODUCTION

The petition for certiorari raises two issues, neither of which remotely merits this Court's review. The first issue is strictly an issue of state common law. The Fourth Circuit properly determined that a Virginia common law fraud claim requires sufficient allegations of causation, and that the Petitioners' complaint failed to allege the requisite loss causation, as described in part in this Court's decision in *Dura Pharmaceuticals v. Broudo, Inc.*, 544 U.S. 336 (2005). The Fourth Circuit's holding on this point did not conflict with any decision by a court of last resort in the state of Virginia. Indeed, Petitioner does not cite to a single case from the courts of the state of Virginia. The second issue raised in the petition concerns a well-settled procedural issue: the standard of review to be applied to a District Court's discretionary denial of further leave to amend a pleading. The Fourth Circuit properly affirmed the District Court's exercise of discretion in denying further leave to amend citing in particular the Petitioners' thirteen months of unilateral pre-action discovery and four prior failed attempts to plead their claims. While Petitioners now seek to characterize the Fourth Circuit's denial of leave to re-plead solely on the basis of futility and cite to an apparent split in the Circuits on application of the abuse of discretion standard to such a determination, the facts of this case on their face do not in any event make it appropriate for consideration of such issue as the denial of leave to re-plead here was not based on futility alone.

In sum, the Fourth Circuit's opinion addresses a non-controversial state common law issue and a well-settled procedural issue. The opinion below does not conflict with any opinion of this Court nor does it conflict with any

opinion of another Court of Appeals or Virginia state court. The opinion below does not raise any important question of federal law or represent any meaningful departure from the accepted and usual course of judicial proceedings. In the end, Petitioners' quarrel is directed at little more than the application of settled common law standards to the unique facts alleged in their case. Nothing in the Fourth Circuit's opinion, however, warrants this Court's attention. Accordingly, the petition should be denied.

COUNTER-STATEMENT OF THE CASE

A. General Background

Respondent Enzo Biochem, Inc. ("Enzo") is a biotechnology company engaged in the research, development and marketing of innovative health care products. (A. 343).[1] Enzo's stock has been publicly traded for approximately 25 years. (A. 255, ¶ 2). The individual Respondents are officers and directors of Enzo, with the exception of Respondent Heiman Gross who is an outside consultant to Enzo. (A. 259-60, ¶¶ 15-18).[2] Petitioner Lawrence Glaser and his family (collectively "Petitioners") were speculators in Enzo stock – buying and selling tens of thousands of Enzo shares on virtually a daily basis for several years, including

[1] References to "A. ___" are to pages of the Sealed Appendix filed in the U.S. Court of Appeals for the Fourth Circuit. References to "Pet." are to the Petition for Certiorari and "App. Pet." to the Appendix attached to the Petition. Most of the relevant facts have, of course, been set forth in the Fourth Circuit and District Court opinions. (App. Pet. 1-49)

[2] Petitioners incorrectly state in their List of Parties that all Respondents are residents and citizens of New York. In fact, Respondent DeLucca is not a citizen and resident of New York.

during the biotech stock "bubble" of late 1999/early 2000.[3] (A. 452-622). Petitioners allegedly purchased Enzo shares on margin and continued to day-trade Enzo stock as the biotech market peaked in early 2000, and then trended downward. (A. 574-80; 560-63). At least part of Petitioners' alleged basis for trading Enzo stock was their receipt of alleged "inside information" from unspecified sources that later proved to be false. (A. 280-81, 292-93, ¶¶ 92-94, 130).

Petitioners allegedly accumulated a significant position in Enzo stock, but by December 2000, were allegedly forced by margin calls to sell their entire Enzo position, resulting in their alleged losses.[4] (A. 259, ¶ 12). On or about January 19, 2001, Petitioner Lawrence Glaser filed for bankruptcy protection in the Eastern District of Virginia. (A. 259, ¶ 12). On March 8, 2001, well after Petitioners had sold all their Enzo shares, Petitioners allegedly learned for the

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[3] From late 1999 through the early months of 2000, the biotechnology sectors of the stock market staged a furious rally. This biotechnology "bubble," as it was commonly known, commenced deflating in early 2000 and then "burst" unexpectedly on or about March 15, 2000 after public statements by President Clinton and Prime Minister Tony Blair threatened the profitability of the gene-based biotech businesses such as Enzo.

[4] During the most relevant time period of January through April 2000, when Petitioners were allegedly induced to *purchase* Enzo shares, they actually also *sold* substantial amounts of Enzo shares on virtually a daily basis. In January 2000, when most of the alleged material misrepresentations were allegedly made, Petitioners *sold* in excess of 150,000 shares for approximately $12 million. In February 2000, Petitioners *sold* more than 80,000 shares for well over $5 million. In March 2000, Petitioners *sold* more than 65,000 Enzo shares for approximately $5 million. In April 2000, Petitioners *sold* more than 250,000 Enzo shares for over $26 million. (A. 567-580). After April 2000, Petitioners were allegedly net sellers of Enzo stock. (A. 261 ¶ 26). As District Judge Lee and Circuit Judge Wilkinson observed, Petitioners' trading records evince an astounding and consistent pattern of day trading. (A. 574-80; 560-63).

first [illegible]e that Enzo had misrepresented facts relating to the efficacy of Enzo's gene therapy, which alleged facts purportedly had artificially inflated Enzo's share price. (A. 289, ¶ 119).[5]

B. Plaintiffs Prepare And Serve Multiple Complaints

Through the use of Fed. R. Bankr. P. 2004 ("Rule 2004"), Petitioners were able to pursue unilateral discovery for thirteen months prior to filing their initial complaint against Respondents, obtaining access through subpoenas to volumes of documents from numerous parties (including highly confidential Enzo documents) and taking depositions of Enzo representatives along with many other parties. (A. 291, ¶ 125). This discovery was for the express purpose of framing the complaint that was ultimately dismissed by the Fourth Circuit. (A. 291, ¶ 125). Petitioners first filed a complaint against the Respondents and others on or about March 6, 2002, alleging, among other things, claims for federal securities fraud, common law fraud and conspiracy. The Petitioners' complaint essentially alleged that beginning in January 2000, Respondents made false statements of fact that inflated the price of Enzo's stock, and that Petitioners were "fraudulently induced to invest in and retain common shares of Enzo at artificially inflated prices." (A. 271-72, 277, 287, 294; Complaint ¶¶ 64, 70, 84, 114 and 135). Petitioners alleged that, had they known the truth, they would have sold their shares, and/or would not have

[5] Petitioners allegedly learned the truth at a public meeting of the Recombinant DNA Advisory Committee (or RAC), a committee formed by the National Institute of Health in response to public concerns over the safety of genetic research and technology. (A. 289, ¶ 119).

purchased additional shares. (A. 295, ¶ 135). The complaint alleged that the "truth" regarding the alleged misrepresentations was revealed to the public on March 8, 2001. (A. 286, 289; Complaint ¶¶ 109 and 119).

After Respondents moved to dismiss the Petitioners' first complaint, Petitioners filed an amended complaint thereby mooting Respondents' first dismissal motion. (A. 40). Subsequently, in August 2002, on the eve of a second motion to dismiss, Petitioners voluntarily dismissed the entire action and simultaneously filed a new action, with a third complaint containing the same essential claims. (A. 254). Respondents then filed another motion to dismiss the third complaint, prompting Petitioners to file yet another amended complaint, again mooting Respondents' motion. (A. 254). The Respondents then moved to dismiss the Petitioners' fourth and final iteration of their complaint. [6] (A. 254).

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[6] The Petitioners' fourth complaint contained four counts, the first two counts for federal securities fraud, and the remaining counts for common law fraud and breach of fiduciary duty. (A. 257, ¶ 7). The crux of the complaint was an alleged "pump and dump" scheme whereby Respondents allegedly "pumped" the stock price with false information so that insiders could then "dump" the stock. (A. 258, ¶ 10). The allegedly misleading statements were mostly made at the annual shareholders' meeting held on January 12, 2000. Curiously, on the next trading day following the allegedly misleading "hype", Petitioners sold 10,000 Enzo shares and also purchased 10,000 Enzo shares. (A. 574-75; 561). Petitioners also assert that "[o]n March 28, 2000, three of the five directors sold a total of 600,000 shares at $81/share." (Pet. 6). In fact, the public trading records disclose that roughly 238,000 total shares of Enzo were traded on that day so Petitioners' allegation could not possibly be true. In addition, it was publicly disclosed in Form 4s that the three directors made gift transfers to their children's trusts, not sales.

C. The First Appeal to the Fourth Circuit

The U.S. District Court for the Eastern District of Virginia granted Respondents' motion to dismiss in its entirety, and Petitioners appealed. On appeal, the Fourth Circuit affirmed the dismissal of all of the Petitioners' claims, including the federal securities fraud and conspiracy claims (App. Pet. 13-35), with the sole exception of the common law fraud claim. As to the common law fraud claim, the District Court had articulated two bases for its dismissal – the inadequate pleading of a material misstatement and reasonable reliance. The Fourth Circuit reversed the District Court in part on the common law fraud claim, holding that only eight of the alleged material misstatements were actionable under the Virginia common law of fraud and that reasonable reliance was sufficiently alleged. (App. Pet. 26-29, 31 n. 6). The Fourth Circuit did not reach or address the issue of loss causation. (App. Pet. 3). Nor did the Fourth Circuit address the ramifications of its holdings on the individual defendants. The case was then remanded to the District Court for further proceedings. (App. Pet. 31).

D. The Second Appeal to the Fourth Circuit

Following remand, Respondents filed a motion to dismiss the sole remaining claim for common law fraud on two grounds that had not previously been addressed. First, Respondents moved to dismiss the common law fraud claim based on the failure to plead adequate loss causation under Virginia common law, relying in part on this Court's analysis in *Dura* which had been issued subsequent to the Fourth Circuit's opinion. Second, Respondents separately moved to dismiss the common law fraud claim against the individual Respondents Elazar Rabbani, Shahram Rabbani,

John Delucca, and Heiman Gross, because none of those individuals were alleged to have made any of the actionable statements left standing by the Fourth Circuit's first opinion.

On July 14, 2005, the U.S. District Court for the Eastern District of Virginia granted Respondents' motion to dismiss the Complaint on both grounds. (App. Pet. 39-49). The District Court also denied Petitioners' motion to amend their complaint for a fifth time, noting that Petitioners "have had ample opportunity to plead their case." (App. Pet. 38). Petitioners appealed, and the Fourth Circuit affirmed the District Court's dismissal of the Complaint, as well as the denial of leave to amend, holding that the Petitioners' Complaint failed to allege any loss causation under Virginia common law, and given the Petitioners' four prior amendments and extensive pre-action discovery, leave to amend had been properly denied.[7] (App. Pet. 1-12). Petitioners then moved for a rehearing en banc which was subsequently denied. This petition for certiorari followed.

[7] The Fourth Circuit also affirmed the dismissal of the fraud claims against individual Respondents Elazar Rabbani, Shahram Rabbani, John Delucca and Heiman Gross because they had made no actionable misstatements. The Petitioners do not seek review of this portion of the Fourth Circuit's opinion.

ARGUMENT

I.

THE RULING BELOW ON LOSS CAUSATION IS ENTIRELY CONSISTENT WITH VIRGINIA COMMON LAW AND DOES NOT RAISE AN ISSUE WORTHY OF THIS COURT'S ATTENTION

A. Virginia Law Requires Pleading of Loss Causation

Petitioners cannot reasonably dispute that the Virginia common law of fraud – like the common law of fraud in other states – requires pleading and proof of proximate causation. Under Virginia common law, "Fraud is a tort. Causation is an essential ingredient of tort actions, whether created by statute or common law." *Lambert v. Downtown Garage, Inc.*, 44 Va. Cir. 102, 104 (1997), *aff'd*, 262 Va. 707, 553 S.E.2d 714 (2001); *see, e.g., Caviness v. DeRand Resources Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993) (common law fraud claim dismissed because of failure to make required showing of proximate causation); *Arnlund v. Deloitte & Touche LLP*, 199 F. Supp. 2d 461, 489 (E.D. Va. 2002) (common law fraud claim dismissed for failure adequately to plead causation between the misrepresentation and the harm).

In connection with a common law fraud claim involving the purchase or sale of securities, pleading of proximate causation is necessary because "if false statements are made in connection with the sale of corporate stock, losses due to a subsequent decline in the market, or insolvency of the corporation brought about by business conditions or other factors in no way relate[d] to the representations will not afford any basis for recovery."

Prosser & Keeton, *Torts* § 110, p. 767 (5th ed. 1984). Thus, a plaintiff asserting common law fraud in Virginia must properly allege proximate causation. *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 369, 585 S.E.2d 578, 582 (2003) ("The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred.").

As part of its obligation to allege and prove proximate causation, a plaintiff asserting a common law fraud claim must plead and establish loss causation. Like the Fourth Circuit, other courts have similarly held that state law requires express pleading of "loss causation" when pleading a common law fraud claim. *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) ("Similar to loss causation, the proximate cause element of common law fraud requires that plaintiff adequately allege a causal connection between defendants' non-disclosures and the subsequent decline in the value of [the] securities."); *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1497 (2d Cir. 1992) (dismissing common law fraud claim for failure to plead proximate causation); *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990) ("If . . . ventures failed not because of the personal shortcomings that the defendants concealed but because of industry-wide phenomena that destroyed all or most such ventures, then the plaintiffs . . . lost nothing by reason of the defendants' fraud and have no claim to damages."); *Ong v. Sears, Roebuck & Co.*, 459 F. Supp. 2d 729, 742 (N.D. Ill. 2006) ("plaintiffs in securities fraud actions, as in common law actions for deceit and misrepresentation, must adequately allege and prove the traditional elements of causation and loss."); *Hunt v. Enzo*

Biochem, Inc., No. 06 Civ. 170, 2006 U.S. Dist. LEXIS 89175, at *53 (S.D.N.Y. Dec. 11, 2006) ("While *Dura* involved a federal fraud claim, it is also applicable to common law fraud claims because the element of causation is the same in both."); *Catton v. Defense Tech. Sys. Inc.*, No. 05 Civ. 6954, 2006 U.S. Dist. LEXIS 205, at *42 (S.D.N.Y. Jan. 3, 2006) ("Because state law fraud claims require a pleading of proximate causation, the deficiency in plaintiffs' pleading of loss causation likely dooms its remaining state law claim."). *See* Restatement of Torts (Second), § 548A at p. 107 (1977) ("there is no liability when the value of the stock goes down after the sale, not in any way because of the misrepresented financial condition, but as a result of some subsequent event that has no connection with or relation to its financial condition . . . Although the misrepresentation has in fact caused the loss, since it has induced the purchase without which the loss would not have occurred, it is not a legal cause of the loss for which the maker is responsible.").

Accordingly, contrary to Petitioners' fundamental premise, Petitioner was in fact required to plead and prove loss causation under Virginia common law. The Fourth Circuit opinion does not represent a departure from settled law, but rather a proper application of it, and as such, it does not warrant review by this Court.

B. The Petitioners Failed To Allege The Requisite Loss Causation

Petitioners failed to satisfy the requisite pleading of loss causation under Virginia common law. Throughout their Complaint, Petitioners simply repeated the same incantation expressly rejected by this Court in *Dura* that

they were "fraudulently induced to invest in and retain common shares of Enzo at artificially inflated prices." (A. 271, 272, 287, 288 and 294). But this type of inflated purchase price theory of causation is insufficient to allege loss causation under Virginia common law, just as it was under the federal securities laws, as it simply does not tie the Petitioners' claimed economic loss to the alleged material misrepresentations. As this Court recognized in *Dura*, after analyzing in part the well-established common law causation principles applicable to a fraud claim, an inflated purchase price will suffice alone as the proximate cause of the relevant economic loss. 544 U.S. at 344. In fact, Petitioners' pleading effectively negated causation because, according to their own Complaint, Petitioners had sold all their Enzo shares before the public allegedly became aware of the true facts at the March 8, 2001 RAC meeting. (A. 286, 289 ¶¶ 109, 119). Even the Petitioners' belated proposed new (fifth) pleading would not cure the deficiencies in their Complaint.[8] *See Hunt* (Court dismisses virtually identical complaint filed by Petitioners' counsel for lack of loss causation under common law). Petitioners exaggerate the burdens imposed on them as they repeatedly intimate that the Fourth Circuit's opinion leaves them (and unknown others with fraud claims) without an effective remedy. The Fourth Circuit *properly* leaves plaintiffs whose losses were caused by external

[8] Petitioners proposed new pleading, albeit more than a dollar short and a day late (see Point II below), relies largely upon vague and conclusory references to unexplained "market corrections" (Pet. 20) and unexplained knowledge of certain "segments of the market" (Pet. 20-21). These conclusory proposals for Petitioners' fifth iteration of their complaint (which in part contradicts the prior four versions of their Complaint) still would not have properly alleged loss causation.

causes (unrelated to any alleged material misrepresentations) without a remedy.[9] The Fourth Circuit does not impose a new or burdensome standard on Petitioners, it enforces an old and traditional standard at common law.

Similarly, and further illustrating the Petitioners' refusal to accept the well-established causation principles applicable to their claims, Petitioners continue to point to their allegations that they retained shares purchased prior to any wrongdoing which they would have sold had they known the truth. (Pet. 12-13). This type of claim is generally referred to as a "holder" claim and is, of course, barred under the federal securities laws. Indeed, this Court recently reiterated its grave concerns about "holder" claims first expressed in its seminal decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730-31 (1975). *See Merrill Lynch v. Dabit*, 126 S. Ct. 1503 (2006). Such "holder" claims have likewise often been rejected at common law in many jurisdictions[10] and were properly

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[9] The Petitioners' inability to allege the requisite causal connection between their alleged losses and the alleged material misstatements is not in the least surprising on many levels. Significantly, there were well-established market forces at work during the relevant time period affecting biotech stocks in general. Indeed, as previously noted, the relevant period has commonly been referred to as the biotech bubble. Moreover, Petitioners' difficulties in alleging, much less establishing, causation are compounded by the nature and magnitude of their trading activity in Enzo stock. (*See* A. 452-622, and particularly A. 574-580).

[10] One court "surveyed the law of jurisdictions around the country and noted that common law claims by holders have been routinely rejected because either damage claims by holders are too speculative, loss causation can not be shown, or it is too difficult to prove reliance." *In re Worldcom, Inc. Sec. Litig.*, Master File No. 02 Civ. 3288, 04 Civ. 0232, 2006 U.S. Dist. LEXIS 11679, at *15 (S.D.N.Y. Mar. 22, 2006), *citing Weinstein v. Ebbers (In re Worldcom, Inc. Sec. Litig.)*, 336 F. Supp. 2d 310, 319-20 (S.D.N.Y. 2004).

rejected by the Fourth Circuit in this case as well because Petitioners could not establish loss causation. Indeed, there is no support in Virginia common law for such a "holder" claim. In *Arnlund v. Deloitte & Touche LLP*, 199 F. Supp. 2d 461, 486-90 (E.D. Va. 2002), the court specifically addressed an identical claim under the Virginia common law of fraud based on analogous allegations asserted by shareholders who allegedly retained their shares in reliance on the defendant accountant's alleged misrepresentations. The *Arnlund* Court granted defendant's motion to dismiss that common law fraud claim precisely because the plaintiffs *could not sufficiently allege loss causation*. *Id.* As the *Arnlund* Court explained, and numerous other courts have similarly held, shareholders whose loss is allegedly occasioned by their retention of shares in reliance on an alleged fraud simply cannot establish causation for their loss because if the "true facts" had been disclosed earlier, the same loss in share price would have occurred only a little earlier. The loss in such circumstances is not caused by the misrepresentation but by the truth, and plaintiffs such as Petitioners here cannot possibly satisfy the loss causation requirement. As the Fifth Circuit further explained:

> "The flaw in the . . . argument is that it assumes a market for the stock existed at an artificially high price. This inflated price, and hence the particular market for the stock, was maintained only because of the wrongdoing. . . . It follows that, had this information been released, the stock price would have immediately and precipitously fallen. . . . Thus, there would have been no market for the stock at the artificially high price. Without such a market, the . . . envisioned 'profit opportunity' evaporates into hardly more than an illusion."

Crocker v. Federal Deposit Ins. Corp., 826 F.2d 347, 351 (5th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). *See Arent v. Distribution Sciences, Inc.*, 975 F.2d 1370, 1374 (8th Cir. 1992); *Sit-Set, A.G. v. Universal Jet Exchange, Inc.*, 747 F.2d 921, 928-29 (4th Cir. 1984) (loss of unrealized sale not caused by misrepresentations since knowledge of true facts would have precluded contract in first place).

C. The Fourth Circuit Properly Relied On This Court's Analysis In Dura

Contrary to Petitioners' contentions (Pet. 11), Respondents do not claim that *Dura* changed the Virginia common law of fraud, but rather that it clarified the requirements for pleading loss causation in a securities trading context. Petitioners complain long and loud about the distinctions between *Dura* and this case and suggest that the Fourth Circuit improperly applied *Dura* to their common law fraud claim. (Pet. 11-12). Petitioners ignore, however, this Court's analysis in *Dura* which was clearly instructive. While it is true that *Dura* was a federal securities fraud class action, and as such, based on a fraud-on-the-market theory of reliance, it does not follow that the Fourth Circuit misconstrued *Dura*. This Court specifically noted in *Dura* that "[j]udicially implied private securities-fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions." 544 U.S. at 343. This Court also observed: "[g]iven the common-law roots of the securities fraud action (and the common-law requirement that a plaintiff show actual damages), it is not surprising that other courts of appeals have rejected the Ninth Circuit's "inflated purchase price" approach to proving causation and loss." 544 U.S. at 344. This Court emphasized in *Dura* that the loss causation

requirement required for pleading violations of federal securities law was taken from, and applicable to, the common law tort requirement of showing proximate cause: "the common law has long insisted that a plaintiff in such a [fraud] case show not only that had he known the truth he would not have acted, but also that he suffered actual economic loss." *Dura*, 544 U.S. at 343-44. The reasoning of *Dura* applies with equal force to the need to establish loss causation for any fraud claim in a securities trading context, be it statutory or common law, because all such claims require a showing of proximate causation. The Fourth Circuit opinion properly cited *Dura* for its analysis and the proposition that Petitioners were required to plead loss causation under state common law. Review of that state common law issue by this Court is not warranted.

D. The Fourth Circuit Opinion Is Not Contrary To The Securities Litigation Uniform Standards Act Or This Court's Holding in *Merrill Lynch v. Dabit*

In their strained effort to identify some purported basis for this Court's review, Petitioners contend that the Fourth Circuit's decision below somehow preempted Virginia's common law of fraud by creating a precedent that limits the right of plaintiffs to pursue Virginia common law fraud claims. Petitioners argue that by "engrafting" the PSLRA requirement of pleading loss causation onto Virginia common law, the Fourth Circuit acted in contravention of the Securities Litigation Uniform Standards Act ("SLUSA") and this Court's opinion in *Merrill Lynch v. Dabit*, 126 S. Ct. 1503 (2006). (Pet. 14-18). Petitioners' argument is based on a distorted construction of the Fourth Circuit's opinion below. First, SLUSA has

nothing whatsoever to do with this case and neither does this Court's decision in *Merrill Lynch v. Dabit*. To be sure, this Court has previously recognized that while SLUSA may preclude use of a class action device in connection with a common law fraud claim in the securities context such as that at issue here, it does not preempt such an individual claim. The Fourth Circuit did not hold, however, that Petitioners' common law fraud claim was preempted in any shape or manner. Rather, the Fourth Circuit analyzed Petitioners' pleading in connection with Virginia's common law requirement of loss causation and determined that Petitioners' complaint simply failed as a matter of law to plead causation adequately. Petitioners simply disagree with the unanimous conclusion of the Fourth Circuit panel.[11]

The Fourth Circuit did not "federalize" Virginia common law or "morph" the PSLRA pleading standards into the common law of Virginia. (Pet. 17). Nor did the Fourth Circuit create a new requirement to plead and prove loss causation. Proximate causation, and with it "loss causation", has always been and remains an "essential ingredient" of such a claim. *See Lambert*, 44 Va. Cir. at

[11] Petitioners repeatedly attempt to suggest that the two decisions of the Fourth Circuit in this case are inconsistent. (Pet. 10). Thus, Petitioners argue that the initial Fourth Circuit panel held that the common law fraud pleading was sufficient. (Pet. 18). In fact, however, as the second panel (which included one member of the initial panel) explained (App. Pet. 6) and the record clearly supports, the only issues addressed on the initial appeal with respect to the common law fraud claim were (a) the existence of material misrepresentations; and (b) Petitioners' reasonable reliance. Initial review was limited to those issues because they were the stated basis for the District Court's initial dismissal of the claim. (*Id.*) The Fourth Circuit simply never addressed the causation element in the initial appeal. Thus, the two decisions are easily reconciled by the Fourth Circuit itself.

104. Nothing in the Fourth Circuit opinion precludes a plaintiff who properly pleads proximate causation from pursuing a common law fraud claim in Virginia.

II.

THE FOURTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF FURTHER LEAVE TO AMEND THE COMPLAINT, PARTICULARLY IN LIGHT OF THE PRIOR HISTORY IN THIS ACTION, AND, IN ANY EVENT, APPLIED THE PROPER STANDARD OF REVIEW SO THERE IS NO ISSUE THAT WARRANTS THE REVIEW OF THIS COURT

Petitioners effectively seek to manufacture a relevant split in the Circuits by alleging that the Fourth Circuit should have utilized a *de novo* standard rather that an abuse of discretion standard in reviewing the district court's denial of further leave to amend their complaint. Specifically, Petitioners assert (Pet. 24) that "when a plaintiff is denied leave to amend on the basis that such amendment would be futile, the standard of review is *de novo* rather than discretionary." Petitioners then point to an alleged split in the Circuits as to the standard of review applied to a decision to deny leave to amend a complaint where the amendment would be futile. Critically, however, Petitioners entire argument is premised upon a mischaracterization of the Fourth Circuit's decision. The Fourth Circuit specifically stated: "Plaintiffs had an unprecedented thirteen months of unilateral pre-complaint discovery under Bankruptcy Rule 2004 and had already set forth four iterations of their complaint. We conclude that the district court did not abuse its discretion in ruling that the

plaintiffs' many opportunities to present their claim warranted denial of the motion to amend." (App. Pet. 11-12). Contrary to Petitioners' assertions, the denial of further leave to amend was not premised on futility alone. All of the cases cited by Petitioners recognize that in such circumstances, the abuse of discretion standard is unquestionably applicable. Indeed, Petitioners themselves cite *Lawal v. RTM*, No. 06-12250, 2006 U.S. App. LEXIS 30856, at *2 (11th Cir. Dec. 12, 2006) as apparently a case with a contrary standard (Pet. 25), but the Eleventh Circuit there stated: "A district court's refusal to grant leave to amend is **reviewed for an abuse of discretion**, although the underlying legal conclusion of whether a particular amendment to a complaint would be futile is reviewed *de novo*." (emphasis added) Since the Fourth Circuit affirmed the denial of further leave to amend based on grounds other than futility, the standard applied was correct pursuant to all the cases cited by Petitioners and there is simply no conflict as to the propriety of the standard applied by the Fourth Circuit in these circumstances. Accordingly, even if there were a conflict in the circuits as to the applicable standard of review of a decision denying further leave to amend on the grounds of futility, the Petition simply does not present an occasion to address such conflict.

Moreover, not only did the Fourth Circuit apply the correct abuse of discretion standard uniformly applied by all the Circuits under these circumstances, the underlying basis for the denial of further leave to appeal is entirely sound and fully supported by the factual record. The Petitioners previously had *four* separate opportunities to set forth a complaint against these same Respondents, and prior to filing their first complaint, they had an unprecedented

opportunity to conduct a year of unilateral pre-complaint discovery under Bankruptcy Rule 2004. Thus, unlike virtually all plaintiffs in similar circumstances, prior to drafting their complaint, Petitioners were able to subpoena documents from, and conduct depositions of, many third parties without the presence or participation of any of the Respondents. They also were able to conduct depositions and obtain documents from the Respondents. Under the unique circumstances of this case, the decision to deny further bites at the apple was clearly well-supported notwithstanding Petitioners' conclusory suggestions to the contrary (Pet. 29).

Finally, in any event, any further leave to amend the complaint would in fact be unwarranted and futile. In seeking leave to amend, Petitioners cited to twelve proposed new paragraphs for inclusion in their complaint.[12] None of the facts set forth therein was unknown or unavailable to Petitioners at the time they filed their initial pleading much less after they filed their fourth version of the complaint, and they offered no legitimate excuse for belatedly seeking to include them in a fifth version of their complaint. Given the history of the action, the Fourth Circuit properly denied Petitioners further opportunities to re-state their claims and recognized that finality was warranted. Moreover, even Petitioners' proposed amendments were futile and failed to cure the specific deficiencies in their pleadings. *See Hunt v. Enzo Biochem, Inc.*, No. 06 Civ. 170, 2006 U.S. Dist. LEXIS 89175 (S.D.N.Y. Dec. 11, 2006) (dismissing virtually identical claims subsequently

[12] Indeed, Petitioners' argument to this Court often obfuscates and confuses the allegations actually set forth in their complaint, with the allegations they subsequently sought to allege if granted further leave to amend their complaint, which leave was denied.

filed by Petitioners' counsel on behalf of different plaintiffs).

CONCLUSION

For all of the foregoing reasons, the petition should be denied together with such other and further relief as the Court deems just and proper.

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Respectfully submitted,

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